

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

THUNDERBIRD TRADING POST, INC., a  
Puyallup Tribal Corporation,

Plaintiff,

v.

U.S. BUREAU OF ALCOHOL, TOBACCO  
AND FIREARMS; STEVE HIGGINS,  
Director; DOUGLAS K. KROUGH, Special  
Agent; AND OTHER AGENTS, names  
unknown; U.S. DEPARTMENT OF  
JUSTICE; INTERNAL REVENUE  
SERVICE; W.D. MALONE, Director;  
STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE

Defendants.

Case No. C92-5181RJB

**ORDER DENYING IN PART AND  
GRANTING IN PART DEFENDANT  
STATE OF WASHINGTON,  
DEPARTMENT OF REVENUE'S  
MOTION TO DISMISS**

This matter comes before the above-referenced motion (Dkt. 75). The court is familiar with all documents filed in support of and in opposition to the motion, and the records and files herein.

In 1999, federal agents ("ATF") seized some 370 cases of cigarettes from the plaintiff ("Thunderbird"). Thunderbird, by its Amended Complaint (Dkt. 68) brought claims against the Washington State Department of Revenue ("State") and the other defendants. It is not clear exactly what claims are made against exactly what defendants from the language of the Amended Complaint. The State now moves to be dismissed from the case on the grounds of state sovereign immunity as recognized by the 11<sup>th</sup> Amendment of the United States Constitution. The plaintiff argues that the state has waived its immunity.

1 It appears reasonably clear from the record that the seized cigarettes that are the subject of this  
2 case are the same cigarettes covered by the Stipulation and Order of Dismissal entered under Docket  
3 No. 9112-096 before the Appeals Division of the Department of Revenue of the State of Washington.  
4 Said proceeding is under the caption of “In the Matter of the Seizure and Forfeiture of: 370+ Cartons  
5 of Unstamped Cigarettes Claimed by the Thunderbird Trading Post, Inc., AKA Elizabeth V. Gord”  
6 (Dtk. 75-3, “Stipulation and Order”).

7 It also appears reasonably clear that the reference in that Stipulation and Order to “as ordered  
8 by the United States District Court for the Eastern District of Washington” is a reference to the Order  
9 to Dispose of Perishable Contraband entered in the United States District Court for the Eastern  
10 District of Washington in Cause No. 91-0285-00 by the Honorable Cynthia Imbrogno, United States  
11 Magistrate Judge, under the title “In the Matter of the Application of the United States for Search  
12 Warrants” (hereafter “Eastern District Order”). It also appears reasonably clear to the court that the  
13 reference to the Eastern District Order in the Stipulation and Order was intended to simply set out an  
14 agreed procedure for handling the subject cigarettes in the Department of Revenue matter (and in this  
15 case). Apparently the cigarettes seized in this case were not covered by the search warrants that were  
16 issued in the Eastern District case.

17 With that background, the court must decide whether the State has waived its 11<sup>th</sup> Amendment  
18 immunity.

19 It appears to the court that the Stipulation and Order was an unequivocal expression of a  
20 waiver of immunity and consent to jurisdiction of a federal court, voluntarily made, but that the waiver  
21 of 11<sup>th</sup> Amendment immunity was limited to complying with an order “by the appropriate federal court  
22 having jurisdiction over said funds.” (The funds being the proceeds from the auction of the seized  
23 cigarettes referred to in the Stipulation and Order.)

24 This conclusion is bolstered by the language of the State’s Reply in Support of Motion to  
25 Dismiss (Dkt. 78, page 5, line 19 - 22) wherein the State acknowledged that it would comply with the  
26 order of the federal courts in arranging return of the auction proceeds. In that document, the State  
27 said, “However, if this Court does determine that the cigarettes seized from Thunderbird were not  
28 contraband, and that decision is upheld in any appeal that my [be] brought by the federal defendants,

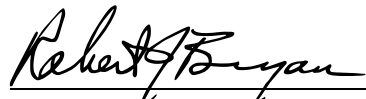
1 the Department will cooperate with the federal agency defendants to arrange return of the auction  
2 proceeds.” That statement, while acknowledging the authority of the federal court, is not entirely  
3 consistent with the Stipulation and Order. Under its Stipulation and Order with the State, the plaintiff  
4 here need not rely on the State’s “cooperation with the federal agency defendants.” The State agreed  
5 with plaintiffs to deposit the funds “as ordered by the appropriate federal court having jurisdiction.”  
6 That is a clear, if limited, waiver of sovereign immunity and a consent to jurisdiction in the federal  
7 court having jurisdiction over the funds.

8 Although the State is only a stakeholder in this case, this court has limited jurisdiction over the  
9 State to issue a order directing the State to deposit proceeds of the auction of the seized cigarettes in  
10 the court’s registry. To that extent, the Motion to Dismiss is DENIED IN PART. All other claims,  
11 such as they may be, against the State, should be dismissed as beyond this court’s jurisdiction, due to  
12 the State’s 11<sup>th</sup> Amendment immunity that has not been waived as to any other claim.

13 Therefore, for the foregoing reasons, and to the extent stated, the State’s Motion to Dismiss is  
14 DENIED IN PART AND GRANTED IN PART.

15 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of  
16 record and to any party appearing *pro se* at said party’s last known address.

17 DATED this 23<sup>RD</sup> day of October, 2006.

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20 Robert J. Bryan  
21 United States District Judge  
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